(4) (3) (4)

Nos. 00-555, 00-587 & 00-590

Supreme Court, U.S.
FILED
NOV 17 2000
CLERK

IN THE
Supreme Court of the United States

WORLDCOM, INC., *et al.*,
Petitioners,
v.
VERIZON COMMUNICATIONS INC., *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP.,
Petitioner,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF BELLSOUTH, SBC, AND VERIZON

WILLIAM P. BARR
M. EDWARD WHELAN
VERIZON SERVICES GROUP
1850 M Street, N.W.
Washington, D.C. 20036
(202) 463-5200

PATRICK F. PHILBIN
STEVEN G. BRADBURY
JENNIFER R. BROSNAHAN
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Verizon Entities

MARK L. EVANS
Counsel of Record
MICHAEL K. KELLOGG
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for BellSouth Corporation and SBC Communications Inc.

November 17, 2000

(Additional Counsel Listed on Inside Cover)

41pp

MICHAEL E. GLOVER
VERIZON
1320 North Courthouse Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944

Counsel for Verizon Entities

CHARLES R. MORGAN
M. ROBERT SUTHERLAND
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-4839

Counsel for BellSouth Corporation

JAMES D. ELLIS
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, Texas 78205
(210) 351-3500

ROGER K. TOPPINS
HOPE E. THURROTT
CHRISTOPHER M. HEIMANN
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8891

Counsel for SBC Communications Inc.

QUESTIONS PRESENTED

1. Whether the FCC acted unlawfully in adopting, for purposes of calculating the price of unbundled network elements, a methodology for measuring the costs of incumbent local exchange carriers ("LECs") that assumes, among other things, a network that at all times is optimally efficient in both its configuration and its use of technology.

2. Whether the FCC acted unlawfully in adopting a rule that requires incumbent LECs, on request, to combine previously uncombined network elements.

3. Whether the FCC acted unlawfully in adopting, for purposes of fixing wholesale discounts, a methodology that measures the costs that an incumbent LEC will avoid as a result of the wholesale arrangement on the counterfactual assumption that the incumbent LEC will entirely withdraw from retailing.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, SBC Communications Inc., and the Verizon Entities* state the following:

BellSouth Corporation has no parent company, and no publicly owned company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

On June 30, 2000, GTE Corporation and Bell Atlantic Corporation closed their merger, and Bell Atlantic Corporation subsequently changed its name to Verizon Communications Inc. Verizon Communications Inc. is the ultimate parent of each of the other Verizon Entities. No publicly owned company owns 10% or more of the stock of Verizon Communications Inc.

---

* The Verizon Entities consist of Verizon Communications Inc., GTE Service Corporation, GTE Alaska Incorporated, GTE Arkansas Incorporated, Verizon California Inc. (f/k/a GTE California Incorporated), Verizon Florida Inc. (f/k/a GTE Florida Incorporated), GTE Midwest Incorporated, Verizon South Inc. (f/k/a GTE North Incorporated), GTE Southwest Incorporated, Verizon North Inc. (f/k/a GTE North Incorporated), Verizon Northwest Inc. (f/k/a GTE Northwest Incorporated), Verizon Hawaii International Inc. (f/k/a GTE Hawaiian Telephone Company Incorporated), Verizon West Coast Inc. (f/k/a GTE West Coast Incorporated), Contel of Minnesota, Inc., and Contel of the South, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

ARGUMENT:

I. IF THIS COURT GRANTS THE PETITION IN NO. 00-511, RESPONDENTS DO NOT OPPOSE CERTIORARI IN THESE CASES INSOFAR AS PETITIONERS SEEK REVIEW OF THE EIGHTH CIRCUIT'S HOLDING CONCERNING RULE 505(b)(1) 4

II. THE EIGHTH CIRCUIT'S HOLDING CONCERNING THE ADDITIONAL-COMBINATIONS RULE DOES NOT MERIT FURTHER REVIEW 11

III. THE EIGHTH CIRCUIT'S HOLDING CONCERNING THE WHOLESALE-DISCOUNT RULE DOES NOT MERIT FURTHER REVIEW 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) . . . . . *passim*

American Trucking Ass'ns, Inc. v. ICC, 669 F.2d 957 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) 17

Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961) 14, 15, 21

GTE Serv. Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000) 22, 24

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 120 S. Ct. 1942 (2000) 28

Hartman v. Duffey, 88 F.3d 1232 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997) 15

Iowa Utils. Bd. v. FCC:

109 F.3d 418 (8th Cir. 1996) 17

120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 11, 12, 23

135 F.3d 535 (8th Cir. 1998), *vacated*, 525 U.S. 1133 (1999) 17

No. 96-3321 (and consolidated cases) (8th Cir. June 10, 1999) 12

No. 96-3321 (and consolidated cases) (8th Cir. Sept. 22, 2000) 27

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 14

Laffey v. Northwest Airlines, Inc., 740 F.2d 1071, 1089 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985) 15

MCI Telecomms. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653) 18

MCI Telecomms. Corp. v. *U.S. West Communications*, 204 F.3d 1262 (9th Cir.), *cert. denied*, No. 00-214, 2000 WL 1202088 (Nov. 13, 2000) 16, 19

Northwestern Indiana Tel. Co. v. FCC, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990) 15

Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502 (4th Cir. 1992) 15

Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999), *cert. dismissed*, No. 99-1244, 2000 WL 1641148 (Nov. 2, 2000) . . . 10

U S West Communications v. *MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000) 16, 19

U S West Communications, Inc. v. Hamilton, Nos. 99-35586 *et al.*, 2000 WL 1568707 (9th Cir. Sept. 13, 2000) 19

United States v. Adesida, 129 F.3d 846 (6th Cir. 1997), *cert. denied*, 523 U.S. 1112 (1998) 15

United States v. Kress, 58 F.3d 370 (8th Cir. 1995) . . . 15

ADMINISTRATIVE DECISIONS

AT&T Communications of Illinois, Inc. Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Co., Nos. 95-0458 & 95-0531, Order, 1996 Ill. PUC LEXIS 320 (Ill. Commerce Comm'n June 26, 1996) 29

AT&T Communications of the Southwest, Inc.'s Petition for Arbitration, Case Nos. TO-97-40 & TO-97-67, Arbitration Order, 1996 Mo. PSC LEXIS 65 (Mo. Pub. Serv. Comm'n Dec. 11, 1996) 29

Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999) 22

Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI, Finding and Order, 1996 Ohio PUC LEXIS 361 (Ohio Pub. Utils. Comm'n June 12, 1996) 29

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) 4, 5, 11, 25

Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Transmission Services, Inc. and GTE Northwest Inc., Docket No. UT-960338, Arbitrator's Report and Decision (Wash. Utils. & Transp. Comm'n Apr. 3, 1997) 28

U S West Communications, Inc. Filing of Advice Letter No. 2610, Docket No. 96S-233T, Commission Decision and Order Regarding Interim Tariffs (Colo. Pub. Utils. Comm'n June 21, 1996) 29

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

U.S. Const. Amend. V 5

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 251(c)(3) . . . . . *passim*

47 U.S.C. § 251(c)(4) 25

47 U.S.C. § 252(d)(1) 4, 6, 7, 9

47 U.S.C. § 252(d)(1)(A)(i) 9

47 U.S.C. § 252(d)(3) 3, 25, 28

47 U.S.C. § 252(e)(5) 17

47 U.S.C. § 252(e)(6) 17, 18

47 U.S.C. § 402(a) 17

Hobbs Act, 28 U.S.C. §§ 2341 *et seq.* 3, 17, 19

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 . . . . . 19, 27

28 U.S.C. § 2112(a)(3) 17

47 C.F.R.:

§ 51.315(b) . . . . . *passim*

§ 51.315(c) 11

§ 51.315(c)-(f) . . . . . *passim*

§ 51.505(b) 11

§ 51.505(b)(1) . . . . . *passim*

§ 51.609 . . . . . 2, 25, 26

§ 51.809 21

Sup. Ct. Rule 10(a) 29

OTHER MATERIAL

Declaration of A. Daniel Kelley, *attached to* Comments of WorldCom, Inc., *Application by Verizon New England Inc., et al. for Authorization to Provide In-Region, Inter-LATA Services in Massachusetts*, CC Docket No. 00-176 (FCC filed Oct. 16, 2000) <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511959786> 27

William Fellner, *The Influence of Market Structure on Technological Progress*, in Am. Econ. Ass'n, *Readings in Industrial Organization and Public Policy* 277 (Homewood: Richard D. Irwin, 1958) 9

Alfred Kahn, *Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness* (Inst. of Pub. Utils. & Network Indus., 1998) 9, 11, 25, 28

Mike Mills, *AT&T Corp. Halts Effort to Sell Local Residential Phone Service*, Wash. Post, Dec. 19, 1997, at G01 27

Robert Stern, Eugene Gressman, Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* (7th ed. 1993) 29

Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice and Procedure* (1981) 16

IN THE

Supreme Court of the United States

No. 00-555

WORLDCOM, INC., *et al.*,
Petitioners,

v.

VERIZON COMMUNICATIONS INC., *et al.*,
Respondents.

No. 00-587

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

No. 00-590

AT&T CORP.,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF BELLSOUTH, SBC, AND VERIZON

Respondents BellSouth Corporation, SBC Communications Inc., and the Verizon Entities ("the incumbent LEC respondents") submit this brief in opposition to the petitions for writs of certiorari filed by the FCC and its supporters AT&T Corp. and WorldCom, Inc.

In challenging the Eighth Circuit's decision in this case, the Federal Communications Commission ("FCC") presents two questions: (1) whether the Eighth Circuit erred in invalidating 47 C.F.R. § 51.505(b)(1), under which incumbent LECs, in

return for furnishing network elements to competitors, may recover only the costs that would be incurred by a hypothetical network that is at all times optimally efficient in terms of technology and configuration; and (2) whether the Eighth Circuit erred in invalidating 47 C.F.R. § 51.315(c)-(f), under which incumbent LECs must combine, on a competitor's request, any elements that are not already combined in their network. AT&T and WorldCom (but not the FCC) raise a third issue: whether the Eighth Circuit erred in invalidating Rule 609, under which the wholesale discount for resold services is determined on the counterfactual assumption that the incumbent LEC abandons retailing and becomes a pure wholesaler.[1]

The FCC's first question presented (concerning the agency's hypothetical-network assumptions) is closely related to the issue raised in a pending petition for a writ of certiorari that we filed last month. In that petition, we challenge the Eighth Circuit's holding that the statute does not require the FCC to use a methodology that takes into account the costs that incumbent LECs have actually incurred historically for network elements. If the Court grants our petition, we therefore do not oppose certiorari in these cases insofar as petitioners seek review of the Eighth Circuit's holding concerning Rule 505(b)(1). On the merits, however, we disagree with the FCC's position and believe, as we summarize below, that the Eighth Circuit's decision on this issue is correct. If this Court grants certiorari — and if it does not endorse the historical-cost reasoning urged in our own petition — it should affirm the court of appeals' decision concerning Rule 505(b)(1).

---

[1] AT&T and a fourth petitioner, General Communication, Inc., also challenge the Eighth Circuit's invalidation of rules relating to rural incumbent LECs. Those issues will be addressed in the United States Telecom Association's separate brief in opposition.

The FCC's second question presented (concerning the additional-combinations rule) does not merit further review. The Eighth Circuit invalidated the additional-combinations rule more than three years ago, and neither the FCC nor any of its supporters chose to raise the issue in the petitions for writs of certiorari they filed at that time. Under settled principles, they thereby forfeited their challenge. Moreover, their claim of a conflict with decisions from the Ninth Circuit is spurious. Because the Eighth Circuit issued its decision in the course of Hobbs Act review of agency regulations, its holding — that the statute does not permit the imposition of an additional-combinations requirement — has nationally binding effect. Now that the Eighth Circuit has clarified that its holding was not superseded by this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), there is no reason to believe that the Ninth Circuit will decline to follow the Eighth Circuit's holding in future cases. In any event, it is unlikely that the issue will again arise in courts of appeals outside the Eighth Circuit: as the FCC acknowledges, in the absence of further review, the agency must conform its regulations to the Eighth Circuit's decision. Finally, the absence of an additional-combinations rule is not of great import, and the Eighth Circuit's holding is correct.

The third question (concerning the wholesale discount), which is raised only by AT&T and WorldCom, likewise does not warrant further review. The FCC has chosen not to raise this question, and it would be unprecedented for this Court, at the behest of private parties, to review a judgment invalidating a federal regulation when the agency that promulgated it has declined to seek review. Moreover, the court of appeals was correct in holding that the FCC's counterfactual retail-exit assumption is contrary to 47 U.S.C. § 252(d)(3). Finally, neither AT&T nor WorldCom points to any conflict among the circuits, and, even if they could do so, any conflict would

dissipate once the FCC promulgates its rules implementing the Eighth Circuit's decision.

I. IF THIS COURT GRANTS THE PETITION IN NO. 00-511, RESPONDENTS DO NOT OPPOSE CERTIORARI IN THESE CASES INSOFAR AS PETITIONERS SEEK REVIEW OF THE EIGHTH CIRCUIT'S HOLDING CONCERNING RULE 505(b)(1).

The first issue raised by the FCC and its supporters, concerning the Eighth Circuit's invalidation of Rule 505(b)(1), is closely related to the issue presented in our own petition in No. 00-511. If the Court grants our petition, we therefore do not oppose certiorari with respect to the Eighth Circuit's invalidation of Rule 505(b)(1). As explained below, however, our decision not to oppose certiorari should not be viewed as signaling agreement with the substantive arguments set forth in the petitions of the FCC and its supporters.

A. Section 251(c)(3) of the Communications Act requires that incumbent LECs furnish competitive LECs with "access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). Section 252(d)(1) contains the applicable pricing standard: the price incumbent LECs may charge competitive LECs for leasing unbundled network elements must be "based on the cost . . . of providing the . . . network element" and "may include a reasonable profit." *Id.* § 252(d)(1). Although the FCC in regulating incumbent LECs' rates traditionally used a *historical*-cost methodology, which measures the amount actually spent on a network, the FCC in the *Local Competition Order*[2] adopted a so-called *forward-looking* methodology, which seeks to project the amount that might be

---

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

spent on a hypothetical network in the future. *See Local Competition Order* ¶¶ 620, 683. The FCC adopted this methodology because, in its view, it would "best replicat[e] . . . the conditions of a competitive market." *Id.* ¶ 679.

At the same time, the FCC subjected its forward-looking methodology (dubbed "TELRIC," which is short for Total Element Long Run Incremental Cost) to certain idiosyncratic assumptions. The FCC required forward-looking costs to be calculated on the assumption that, at any given time, an incumbent LEC operates a purely hypothetical network employing "the most efficient network architecture, sizing, technology, and operating decisions that are operationally feasible and currently available to the industry." *Id.* ¶ 683. According to the FCC, this assumption would again "replicate conditions in a highly competitive marketplace." *Id.* The FCC made only one minor exception to its assumptions: although its methodology assumes networks that are optimally efficient at all times and in all respects, it assumes that those networks place the wire center (at which all "local loops" converge and connect to a switch) in the same location as the incumbent LECs' actually existing network*s*. *See id.* ¶ 685. This wire-center exception, the FCC said, would "mitigat[e] incumbent LECs' concerns that a forward-looking pricing methodology ignores existing network design." *Id.*

Before the court of appeals, the incumbent LEC respondents challenged both the FCC's adoption of a forward-looking-cost methodology and the FCC's hypothetical-network assumptions. *First*, the incumbent LECs argued that the statute, by (among other things) using the term "cost," requires a methodology that takes account of the historical costs actually incurred — particularly because a refusal to permit recovery of costs that were prudently incurred in the past might effect a taking in violation of the Fifth Amendment. They also claimed that the FCC had failed to explain coherently why it should abandon the historical-cost

approach that it had traditionally used. *Second*, the incumbent LECs argued that a proper interpretation of Section 252(d)(1) at a minimum prohibited the FCC from making efficiency assumptions that by their nature could never be met in real life. They also claimed that the FCC had acted arbitrarily in adopting those assumptions because, among other things, the FCC's belief that these assumptions would hold true in a perfectly competitive market was economically incorrect.

The court of appeals agreed in part and disagreed in part. It rejected the incumbent LECs' first contention. According to the court, "the term 'cost,' as it is used in the statute, is ambiguous," and the FCC's decision to interpret that term as referring to forward-looking and not historical costs was "reasonable." Pet. App. 11a, 12a.[3] The court rejected as "not ripe for review" the incumbent LECs' claim that constitutional considerations required the FCC to construe the statute to permit incumbent LECs to recover the historical costs they had actually incurred. *Id.* at 16a-17a. On the other hand, the court of appeals sustained the incumbent LECs' challenge to Rule 505(b)(1). As the court noted, the language of Section 252(d)(1) requires that network-element rates be based on "the cost to the ILEC of providing its existing facilities and equipment." *Id.* at 9a. "[I]t is the cost of providing the actual facilities and equipment that will be used by the competitor (and not some state of the art presently available technology ideally configured but neither deployed by the ILEC nor to be used by the competitor) which must be ascertained and determined." *Id.* at 9a-10a.

B. On October 4, 2000, we filed a petition for a writ of certiorari (No. 00-511) seeking review of the Eighth Circuit's judgment insofar as that court upheld the FCC's rejection of

---

[3] "Pet. App." refers to the Appendix to the FCC's Petition in No. 00-587.

a historical-cost methodology. As our petition explains, the Eighth Circuit's error concerns a question — what price may incumbent LECs charge their competitors for leasing parts of their network? — of great importance to the vast and growing telecommunications industry. *See* Incumbent LECs' Pet. 2.

The FCC and its supporters now seek review of the other aspect of the Eighth Circuit's decision concerning network-element prices — its holding that the statute prohibits the hypothetical-network approach embodied in Rule 505(b)(1). The question presented in their petitions is thus closely intertwined with the question presented in No. 00-511. Both arise under the same statutory provision, Section 252(d)(1), and both concern pricing of the same unbundled network elements. It would be artificial to place before the Court one aspect of the FCC's pricing methodology (its refusal to permit recovery of historical costs, despite the serious constitutional issues raised by this) but not a closely related aspect (the hypothetical-network assumptions made in the FCC's methodology). *See* Incumbent LECs' Pet. 20-21 n.7. Accordingly, if the Court grants our petition, respondents do not oppose certiorari in these cases insofar as petitioners seek review of the Eighth Circuit's holding concerning Rule 505(b)(1).[4]

C. On the merits, however, the Eighth Circuit's judgment with respect to this issue was correct. Although we will postpone to our merits briefs (assuming the Court grants certiorari) a full rebuttal of the argument advanced by the FCC and its supporters, certain points require mention even at this early stage.

---

[4] The FCC has reached a similar conclusion: observing that the questions presented in our petition and the first question presented in its petition are "closely interrelated," it "do[es] not oppose" our petition. FCC Pet. 23 n.13.

1. The FCC and its supporters characterize TELRIC as a reasonable methodology that has widespread economic support. They are mistaken. Even assuming that a forward-looking methodology might be permissible under the Act, TELRIC makes unrealistic efficiency assumptions that are without any basis in economics.

At any given time, TELRIC allows incumbent LECs to recover only the costs that would be incurred by a hypothetical network that, save for its wire-center location, is, as a theoretical matter, at all times optimally efficient in all respects. Because costs in the telecommunications industry (much as in the computer industry) are constantly declining due to rapid technological progress, providing service with a network embodying the latest technology is inevitably less costly than doing so with a network using older technology. And it is self-evident that providing service with a network employing optimal network architecture, sizing, and operating decisions is less costly than doing so with a network not answering that description.

Real-life carriers cannot constantly modify their real-world networks to make them optimally efficient in terms of technology and configuration. Telephone networks consist largely of long-lived capital goods, such as switches, wire, cable, poles, and conduit. Replacing or uprooting already installed plant and equipment before the end of its economic life would be imprudent and wasteful. Thus, the FCC's approach irrationally assumes the use of a network more efficient than could ever exist in real life.

The FCC thereby also undershot its target of setting prices at the level that would prevail in a competitive market. Even in a perfectly competitive market, output prices would not constantly decline to the cost of providing service with an

optimally efficient network.[5] Even if new entrants could build optimally efficient networks overnight, they would not recover their costs if they set their prices to reflect only the costs of providing service over their newly built networks. After all, the reality that networks that are optimally efficient today will no longer be optimally efficient tomorrow applies to entrants no less than to incumbents.[6]

2. The FCC and its supporters are similarly mistaken in the way they describe and criticize the Eighth Circuit's decision. In particular, the FCC and its supporters misread the Eighth Circuit's opinion when they claim that the court eccentrically latched onto the word "the" in Section 252(d)(1)(A)(i)'s phrase "cost . . . of . . . the . . . network element." FCC Pet. 11, 17; AT&T Pet. 7; WorldCom Pet. 18. Far from hinging on a single article, the Eighth Circuit's opinion recognized that Section 252(d)(1) governs pricing "for purposes of subsection (c)(3) of [Section 251]"; that Section

---

[5] *See* Alfred Kahn, *Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness* 91 (Inst. of Pub. Utils. & Network Indus., 1998) ("Kahn, *Letting Go*"); William Fellner, *The Influence of Market Structure on Technological Progress*, in Am. Econ. Ass'n, *Readings in Industrial Organization and Public Policy* 277, 289-90 (Homewood: Richard D. Irwin, 1958).

[6] In proceedings below and elsewhere, the FCC and its supporters have made three arguments in response to our challenge. They have claimed that the wire-center exception ameliorates TELRIC's under-recovery, that regulatory lag (*i.e.*, the time lapse between re-determinations of rates) likewise ameliorates the problem, and that proper depreciation rules may be able to solve the problem altogether. But the wire-center exception and regulatory lag only diminish, and come nowhere near eliminating, the harm to incumbent LECs. The FCC's reliance on depreciation rules is entirely baseless. The order under review nowhere reflects any intent to solve the problem described above with special depreciation rules.

251(c)(3) requires incumbent LECs to make available only the network elements that they actually have, not superior network elements; and that "the cost . . . of . . . the . . . network element" therefore must refer to the cost of the actual network elements made available — not to network elements better and more efficient than could ever exist in real life. *See* Pet. App. 8a-10a. Far from being illogical, that reading is compelled by the language, structure, and purpose of the statute.[7]

The FCC and its supporters also argue that, because a hypothetical-network approach is part and parcel of any forward-looking methodology, the Eighth Circuit contradicted itself by holding that the statute condones a forward-looking methodology but forecloses a hypothetical-network approach. *See* FCC Pet. 17; WorldCom Pet. 19. A forward-looking-cost methodology, according to the FCC, assumes a time horizon long enough to allow all elements to be replaced. And, if one is going to replace assets, the FCC argues, it is irrational to assume that they will be replaced with anything other than the most efficient assets available in the marketplace.

The FCC's argument starts from a considerable disadvantage: if it were correct, TELRIC itself would be fatally self-contradictory. After all, TELRIC itself does not

---

[7] Because a different statute was involved, the FCC and its supporters are wrong when they argue (*see* FCC Pet. 15, 22; AT&T Pet. 14; WorldCom Pet. 2, 14) that the Eighth Circuit's decision conflicts with the Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. dismissed*, No. 99-1244, 2000 WL 1641148 (Nov. 2, 2000). Even further afield is AT&T's claim that the Eighth Circuit's decision conflicts with decisions of other courts of appeals upholding cost methodologies adopted by other agencies. *See* AT&T Pet. 13-14. Those methodologies were different from the FCC's and were promulgated pursuant to entirely different statutes.

apply the optimal-efficiency assumptions consistently: it holds wire-center locations constant. *See Local Competition Order* ¶ 685. Indeed, there is nothing to the argument. Even if forward-looking methodologies contemplate replacement of assets, the FCC has never explained why it follows that one must assume that all network assets will be replaced instantly and simultaneously. That assumption is plainly unrealistic. *See* Kahn, *Letting Go* 91.

The FCC and its supporters distort the Eighth Circuit's opinion in various additional ways that require even less discussion at this point. For example, they surmise that the Eighth Circuit may have held that the statute requires a *short-run* forward-looking-cost methodology, which, because it would make no allowance for capital investment, would result in lower (not higher) element prices. *See* FCC Pet. 20 & n.10; WorldCom Pet. 19. But the Eighth Circuit nowhere said this and in fact left undisturbed the part of Rule 505(b) mandating a long-run methodology. Similarly, the FCC and its supporters are wrong in suggesting that the Eighth Circuit believed the statute to require a reproduction methodology. *See* FCC Pet. 18; WorldCom Pet. 19. The court of appeals simply did not say that anywhere.

II. THE EIGHTH CIRCUIT'S HOLDING CONCERNING THE ADDITIONAL-COMBINATIONS RULE DOES NOT MERIT FURTHER REVIEW.

A. The next issue raised by the FCC concerns Rules 315(c)-(f), the so-called "additional combinations" rule. Under this rule, an incumbent LEC must upon request "combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network." 47 C.F.R. § 51.315(c). The Eighth Circuit invalidated this rule more than three years ago, in its July 1997 decision. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). The court of appeals held that the rule

was contrary to Section 251(c)(3), which, after providing in the first sentence only that incumbent LECs must make available unbundled network elements to requesting competitive LECs, provides in the second sentence that incumbent LECs must do so "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3). The court of appeals held that the statute is thus clear that incumbent LECs cannot be required to do the combining. *See* 120 F.3d at 813.

In 1997, the FCC and its supporters filed petitions for certiorari raising various issues, but they failed to seek review of the Eighth Circuit's invalidation of Rules 315(c)-(f). Accordingly, this Court's previous opinion in this case did not address Rules 315(c)-(f). *See* Pet. App. 26a. Nevertheless, petitioners requested (and received) permission to address in their remand briefs whether this Court's decision undermined the Eighth Circuit's previous holding with respect to Rules 315(c)-(f). *See* Order at 2-3, *Iowa Utils. Bd. v. FCC*, No. 96-3321 (and consolidated cases) (8th Cir. June 10, 1999). In their remand briefs, the FCC and its supporters argued that this Court's reasoning with respect to another rule, Rule 315(b), which prohibits incumbent LECs from separating already combined elements, implied that the Eighth Circuit's holding concerning Rules 315(c)-(f) could not stand either. *See* Pet. App. 24a. They argued that, whereas the Eighth Circuit had invalidated Rule 315(b) as contrary to the language of Section 251(c)(3) requiring access to elements only "on an unbundled (as opposed to a combined) basis," 120 F.3d at 813, this Court had held that the "unbundled" language in Section 251(c)(3) was "ambiguous on whether leased network elements may or must be separated," 525 U.S. at 395. Contending that the Eighth Circuit's ruling with respect to Rules 315(c)-(f) turned on its view of the same

"unbundled" language, the FCC and its supporters argued that this ruling could not survive this Court's decision.

The Eighth Circuit disagreed and saw no reason to disturb its earlier ruling. As the court of appeals explained, this Court's decision concerning Rule 315(b) hinged on its determination that Section 251(c)(3) was ambiguous on whether an incumbent LEC may separate already combined elements. *See* Pet. App. 28a. In the court of appeals' view, that holding did not affect its earlier conclusion that Section 251(c)(3) directly addressed whether an incumbent LEC may be required to combine elements that are not already combined. *See id.* Whereas Congress had left ambiguous whether an incumbent LEC may separate already combined elements, the court of appeals said, it had "directly spoken on the issue of who shall combine previously uncombined network elements" by providing that an incumbent LEC need do no more than provide elements "'in a manner that allows requesting carriers to combine such elements in order to provide such telecommunication service.'" *Id.* at 28a-29a.

B. The FCC and its supporters now invite this Court to review that ruling. *See* FCC Pet. 25-29; AT&T Pet. 24-30; WorldCom Pet. 23-27. This Court should decline that invitation, for four reasons.

First, although the FCC and its supporters imply that this Court somehow overlooked something when, in its previous decision in this case, it "did not specifically address Rules 315(c)-(f)," AT&T Pet. 26; *see also* FCC Pet. 27; WorldCom Pet. 24, there is no basis for their indignation. This Court's previous decision failed to address the Eighth Circuit's holding concerning Rules 315(c)-(f) not because of some oversight on the Court's part but because the FCC and its supporters never challenged it. Although their petitions challenged several other holdings of the court of appeals, they presented no question concerning the additional-combinations

rule. By failing to include that challenge, the FCC and its supporters waived it.[8]

In that respect, this case is indistinguishable from *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961). There, the petitioner challenged numerous rulings of a federal agency in its petition for review to the court of appeals, including the agency's refusal to compel production of a particular set of documents (though it did not argue the point in its brief). *See id.* at 30. Upon losing in the court of appeals, the petitioner filed a petition for a writ of certiorari, but it did not include among the questions presented the agency's refusal to compel production of the documents. *See id.* After prevailing in this Court on other grounds, the petitioner raised the issue on remand in the court of appeals. *See id.* Following another loss in the court of appeals, the petitioner filed a second petition for a writ of certiorari, raising the document-production issue for the first time in this Court. *See id.* Although this Court granted the petition and addressed other issues, it refused to address the document-production issue, stating:

---

[8] The FCC candidly acknowledges that it did not itself challenge Rules 315(c)-(f) but implies that AT&T did challenge those rules — even though it concedes that AT&T mentioned those rules "only in passing." FCC Pet. 13 n.6; *see id.* at 27. In fact, AT&T failed to mention the additional-combinations rule in its 1997 petition. AT&T's only reference to that rule appeared in its merits brief, and then only as part of a misguided claim that the Eighth Circuit had invalidated the rule on grounds related to its jurisdictional holding. *See* Brief of Petitioners AT&T *et al.* at 34, *AT&T Corp. v. FCC*, Nos. 97-826 *et al.* (filed Apr. 3, 1998). As confirmed by this Court's refusal to address that claim, this plainly was not enough to preserve any additional-combinations argument, *see Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 & n.5 (1993) — let alone the different argument made now.

> It is too late now for the Party to raise this error of the Board. That error could have been raised here five years ago. . . . The demands not only of orderly procedure but of due procedure as the means of achieving justice according to law require that when a case is brought here for review of administrative action, all the rulings of the agency upon which the party seeks reversal, and which are then available to him, be presented. Otherwise we would be promoting the "sporting theory" of justice . . . . We hold that the Communist Party abandoned its claim of error . . . by failing to raise that question in its previous petition for certiorari here.

Id. at 30-32.[9]

---

[9] The rule is no different in the federal courts of appeals. *See, e.g., United States v. Adesida*, 129 F.3d 846, 849-50 (6th Cir. 1997) ("Defendant could have raised his arguments . . . in the prior appeal, but failed to do so, and, therefore, he waived his right to raise these issues . . . before this court on appeal after remand."), *cert. denied*, 523 U.S. 1112 (1998); *Hartman v. Duffey*, 88 F.3d 1232, 1236 (D.C. Cir. 1996) ("We do not reach the merits of defendant's arguments on this issue because of the defendant's failure to pursue it in its prior appeal."), *cert. denied*, 520 U.S. 1240 (1997); *United States v. Kress*, 58 F.3d 370, 373 (8th Cir. 1995) ("Where a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter."); *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) ("[I]n its initial appeal to this court, Omni chose to focus exclusively on the conspiracy aspects of the case. Now that Omni has lost on those grounds [in the Supreme Court], it cannot turn back the clock and resuscitate the monopolization and attempt to monopolize theories that it earlier chose not to pursue."); *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand."), *cert. denied*, 493 U.S. 1035 (1990); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089

The FCC and its supporters here seek to pursue the very sporting theory of justice that this Court denounced. Perhaps fearful that an overabundance of issues raised would make it less likely that this Court would agree to review any, neither the FCC nor its supporters chose to raise the additional-combinations issue three years ago. They did challenge the court of appeals' holding concerning Rule 315(b), presenting an issue concerning which there was likewise no conflict of authority. Only after prevailing on that issue in this Court did they raise the issue of Rules 315(c)-(f) on remand, claiming that the precedent they had established in connection with Rule 315(b) would be helpful to that end. This kind of incrementalism cannot be permitted. If it were, the FCC would presumably be free, were it to prevail here on the additional-combinations issue, to raise in a third petition the court of appeals' holding concerning the superior-quality rule (*see* Pet. App. 25a-26a) — an issue that it did not raise three years ago or even now. Judicial review would never come to an end.

Second, the FCC and its supporters are wrong in arguing (*see* FCC Pet. 27-28; AT&T Pet. 26-27; WorldCom Pet. 23-24) that there is a certworthy conflict of authority between the Eighth Circuit's decision on review of an FCC rule-making and two decisions of the Ninth Circuit on review of state commissions' arbitration orders. *See U S West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000); *MCI Telecomms.*

(D.C. Cir. 1984) (*per curiam*) ("Adherence to the rule that a party waives a contention that could have been but was not raised on a prior appeal is, of course, necessary to the orderly conduct of litigation.") (internal quotation marks, citation, and brackets omitted), *cert. denied*, 469 U.S. 1181 (1985); Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice and Procedure* § 4478, at 801 (1981) ("[i]f the matter is omitted from one appeal, . . . it may be held foreclosed on a later appeal").

Corp. v. *U.S. West Communications*, 204 F.3d 1262 (9th Cir.), *cert. denied*, No. 00-214, 2000 WL 1202088 (Nov. 13, 2000). As explained more fully below, now that the Eighth Circuit has explained that its holding concerning the additional-combinations rule survives this Court's previous decision in this case, the Ninth Circuit will likely follow the Eighth Circuit's holding in future cases. Even if this were otherwise, the conflict would dissipate without this Court's intervention.

The Eighth Circuit decided this case on petitions for review of agency rulemaking filed under the Hobbs Act (28 U.S.C. §§ 2341 *et seq.*) in various courts of appeals and consolidated in the Eighth Circuit in accordance with the lottery mechanism of 28 U.S.C. § 2112(a)(3). *See* Pet. App. 4a; *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 421 (8th Cir. 1996). Thus, there can be no doubt that, insofar as the FCC itself is concerned, the Eighth Circuit's interpretation of Section 251(c)(3) is binding nationwide. For example, now that the Eighth Circuit has held that an additional-combinations requirement violates Section 251(c)(3), the FCC is no longer free to reimpose such a requirement when adjudicating a case in which it acts as an arbitrator under Section 252(e)(6).[10] That is so even in arbitration cases that are appealable only to courts of appeals other than the Eighth Circuit. *See, e.g., Iowa Utils. Bd. v. FCC*, 135 F.3d 535 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999); *American Trucking Ass'ns, Inc. v. ICC*, 669 F.2d 957, 960-61 (5th Cir. 1982) (*per curiam*), *cert. denied*, 460 U.S. 1022 (1983).

---

[10] Pursuant to Section 252(e)(5), the FCC arbitrates interconnection disputes whenever a state commission declines to do so. *See* 47 U.S.C. § 252(e)(5). The resulting arbitration decisions are reviewable in courts of appeals. *See* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2341 *et seq.*

The FCC argues, however, that the Eighth Circuit had exclusive jurisdiction to determine only the validity of requirements imposed by FCC rules — not equivalent requirements imposed by state commissions. *See* FCC Pet. 28 & n.16. Thus, in the FCC's view, when the Eighth Circuit invalidates FCC rules, state commissions (at least commissions in States outside the Eighth Circuit's territory) remain free to decide for themselves whether the Communications Act permits them to impose a duty to provide additional combinations. *See id.* at 28. Although those determinations are then subject to review in federal district courts and courts of appeals, *see* 47 U.S.C. § 252(e)(6), those courts, in the FCC's view, would also be free to determine afresh whether the requirements involved are consistent with the statute, *see* FCC Pet. 28 n.16. In the FCC's view, then, state commissions need not obey the Eighth Circuit — even though state commissions must obey the FCC, which itself must obey the Eighth Circuit.

The FCC's view is mistaken. After this Court's jurisdictional holding in its previous decision in this case, it is clear that state commissions act merely as "'deputized' federal regulator[s]": they exercise a "federal regulatory function delegated to them by the federal government." *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 341, 344 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3297 (Oct. 23, 2000) (No. 00-653). Plainly, the deputy may not do what the principal may not. Interpretations that are binding on the FCC are therefore just as binding on state commissions.

Any other conclusion would be fatally at odds with this Court's view that "a federal program administered by 50 independent state agencies is surpassing strange." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6; *see id.* at 385 n.10 ("we are aware of no similar instances in which federal policymaking has been turned over to state administrative agencies"). The regime

that the FCC proposes here would be a great deal stranger: it would involve a federal program in which 50 independent state agencies must follow FCC rules that are upheld but may follow or ignore as they see fit FCC rules that are invalidated. That regime would also be entirely at odds with the FCC's previous claim that Congress empowered it to decide interpretive issues arising under the Telecommunications Act of 1996 in the course of rulemaking "so that a single court of appeals could resolve those issues on the merits." Opening Brief for the Federal Petitioners at 40, *FCC v. Iowa Utils. Bd.*, No. 97-831 (filed Apr. 3, 1998).

It is far from clear that the Ninth Circuit viewed matters differently. When incumbent LECs argued that the Ninth Circuit was bound to follow the Eighth Circuit's holding, the Ninth Circuit did not quarrel with the premise but stated only that "[t]he Supreme Court's opinion . . . undermined the Eighth Circuit's rationale." *U S West*, 193 F.3d at 1121; *see also MCI Telecomms.*, 204 F.3d at 1268 ("The Court's holding concerning Rule 315(b) . . . confirms that the Eighth Circuit's interpretation of the Act was incorrect."). Thus, the Ninth Circuit apparently believed that, although it would ordinarily be required to follow the Hobbs Act court's holdings, that duty was superseded by intervening Supreme Court precedent undermining the Eighth Circuit's holding. Now that the Eighth Circuit has explained that this Court's holding with respect to Rule 315(b) did not undermine the court of appeals' rationale with respect to Rules 315(c)-(f), *see* Pet. App. 27a-28a, the Ninth Circuit presumably will follow the Eighth Circuit in future cases.[11] There will be time

---

[11] *U S West Communications, Inc. v. Hamilton*, Nos. 99-35586 *et al.*, 2000 WL 1568707 (9th Cir. Sept. 13, 2000), is not to the contrary. Although the court there cited the two decisions discussed in the text, it did not have occasion to revisit their substance because it rested its holding on an unrelated ground (mootness). *See id.* at *8.

enough to grant review if and when this expectation turns out to be mistaken.[12]

In any event, even if it were clear that the Ninth Circuit believed itself free to ignore the Eighth Circuit's holding, the conflict should dissolve without this Court's intervention. The FCC acknowledges that, absent further review, it will be required to conform its regulations to the Eighth Circuit's decision.[13] Although the FCC and its supporters make these statements about the invalidated pricing rules, there is no reason why the same principle would not apply equally to the additional-combinations rule. Thus, if the Court denies certiorari here, the FCC will presumably conform its regulations to the Eighth Circuit's view of the law, making clear that incumbent LECs are not required to provide their competitors with additional combinations. With a nationally binding FCC rule in effect, conflicts could no longer arise.

Third, as the FCC and its supporters have effectively conceded, the Eighth Circuit's invalidation of the additional-combinations rule is insufficiently significant to warrant this Court's attention in the absence of a certworthy conflict of authority. In 1997, the FCC and its supporters raised various conflict-less issues, including the validity of Rule 315(b) (the

---

[12] And, in that case, it would plainly be more sensible to accept for review a case from the Ninth Circuit: unlike the instant case, a case from the Ninth Circuit would present not only the issue of the meaning of the underlying statute but also the preliminary jurisdictional issue.

[13] *See* FCC Pet. 22 ("[i]n the absence of further review by this Court, the FCC would be required to consider new, nationally binding rules consistent with the Eighth Circuit's decision"); *see also* Pet. App. 16a ("Our remand to the FCC of the TELRIC rule should result in a new rule for determining the compensation that the ILECs will receive for the new competitor's use of the ILEC's property."); WorldCom Pet. 14 ("The FCC would have to begin a new rulemaking proceeding to devise new pricing principles for unbundled network elements and resold services.").

separation rule) and Rule 809 (the pick-and-choose rule). But they did not raise the additional-combinations issue.[14] Even now, the FCC and its supporters apparently do not believe the invalidation of the additional-combinations rule to be of the same importance as the invalidation of Rule 505(b)(1): whereas they each sought a stay of the Eighth Circuit's mandate insofar as Rule 505(b)(1) was concerned, they sought no comparable relief with respect to Rules 315(c)-(f). Indeed, AT&T's petition ranks the issue fourth in importance — after the even more clearly uncertworthy rural and resale-discount issues. *See* AT&T Pet. i.

This implicit acknowledgment — that the Eighth Circuit's invalidation of Rules 315(c)-(f) raises no issue of sufficient significance to warrant this Court's review — is correct. Although the FCC suggests (Pet. 25-26) that competitive LECs may be unable to combine network elements if incumbent LECs fail to do it for them, that is simply not so. In the wake of the Eighth Circuit's 1997 decision, incumbent LECs have made not-already-combined elements available to competitive LECs by delivering each individual element to competitive LECs' facilities, where they are perfectly able to combine the elements and integrate them with their own facilities. That arrangement works just as well for elements to be combined as for individually furnished network elements.[15]

---

[14] As this Court put it in the similar *Communist Party* case: "The [previous] petition for certiorari . . . presented ten major questions and innumerable subsidiary points. Yet the [issue raised in the second round of review], which it is now argued looms so large in the context of this extraordinarily lengthy and complex proceeding, was not raised, and not raised by highly experienced lawyers who vigorously contended every step of the litigation." 367 U.S. at 32 n.8.

[15] Incumbent LECs furnish elements to be combined in the same way in which they furnish all network elements: by stringing wires from the

Finally, the Eighth Circuit's holding concerning the additional-combinations rule is correct. Section 251(c)(3) imposes upon incumbent LECs only an obligation to furnish unbundled network elements. The Act nowhere imposes an obligation to supply the labor and ingenuity necessary to combine unbundled network elements. Moreover, the second sentence of Section 251(c)(3) confirms that Congress envisioned that competitive LECs would do the combining, by imposing upon incumbent LECs only an obligation to furnish unbundled network elements "in a manner that allows requesting carriers to combine such elements." 47 U.S.C. § 251(c)(3). After this Court's previous decision concerning unbundling duties, *see* 525 U.S. at 388-90, it is plain that the FCC has no authority to "impos[e] an [unbundling] obligation on LECs that has no apparent basis in the statute," *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000). Because the statute provides no basis for — and indeed contradicts — an obligation to combine unbundled network elements, the

---

element (say, the loop or the switch port) to competitive LECs' "collocation" areas, the parts of the incumbent LEC's central office that competitive LECs rent. In those areas, competitive LECs can then combine the leased elements or integrate them with elements of their own. To the extent that the FCC and its supporters claim that incumbent LECs have refused to allow competitive LECs to combine network elements, *see* FCC Pet. 26; AT&T Pet. 28 & n.11; WorldCom Pet. 25-26, they are referring to something altogether different. For reasons of safety and network integrity, incumbent LECs usually do not permit competitive LECs' technicians to roam through the central office and physically combine elements in the incumbents' areas. But, as the FCC has itself found, that hardly disables competitive LECs from combining network elements. *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶¶ 231-232 (1999).

Eighth Circuit was entirely correct in holding that the FCC is powerless to impose it.[16]

This Court's decision concerning Rule 315(b) did not undermine the Eighth Circuit's interpretation. The Eighth Circuit "did not . . . employ the same rationale for invalidating subsections (c)-(f) as [it] did in invalidating subsection (b)." Pet. App. 28a. Whereas the court of appeals invalidated Rule 315(b) on the basis of its interpretation of the phrase "on an unbundled basis" in the first sentence of Section 251(c)(3), *see* 120 F.3d at 813; 525 U.S. at 376-77, it invalidated Rules 315(c)-(f) on the basis of its reading of the second sentence of Section 251(c)(3) and its interrelation with the first sentence, *see* 120 F.3d at 813.[17] As urged by the FCC,[18] this Court held merely that the FCC needs no express

---

[16] The FCC itself has stated that the Eighth Circuit's interpretation was merely "a restatement of its conclusion in striking down the related rule requiring ILECs to provide 'superior' network elements: '[S]ubsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network — not to a yet unbuilt superior one.'" FCC Response to Petitions for Rehearing at 9, *Iowa Utils. Bd. v. FCC*, No. 96-3321 (and consolidated cases) (8th Cir. filed Oct. 1, 1997). That conclusion was similarly correct, as confirmed by the fact that neither the FCC nor any of its supporters has challenged it even now.

[17] The paragraph in the Eighth Circuit's 1997 opinion that begins with "Section 251(c)(3)" was separately added after the Eighth Circuit resolved a rehearing petition specifically challenging Rule 315(b). *Compare* 1997 U.S. App. LEXIS 18183 *with* 1997 U.S. App. LEXIS 28652. That paragraph thus addresses only Rule 315(b), whereas the preceding paragraph addresses only Rules 315(c)-(f).

[18] *See* Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents at 24 n.17, *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 *et al.* (filed June 17, 1998) ("the discriminatory and wasteful character of the conduct prohibited in Rule 315(b) justifies that rule quite apart from a separate issue on which we have not sought this Court's review: whether an incumbent must itself *combine* previously *uncombined* elements before making them available to new entrants").

statutory authorization to "ensur[e] against an anticompetitive practice" in the form of the imposition of "wasteful costs" in connection with the provision of unbundled network elements. 525 U.S. at 395. That holding in no way conflicts with its holding elsewhere that the FCC may not impose entirely new sharing duties without express statutory basis. *See id.* at 389-90.

The FCC objects, however, that network elements can sometimes be connected at lower cost if the incumbent LEC does it for the competitive LEC. *See* FCC Pet. 25-26; *see also* AT&T Pet. 28; WorldCom Pet. 25-26. Perhaps this is so in some cases. But, "[i]t was precisely this kind of rationale, based on presumed cost savings, that the Supreme Court flatly rejected in *Iowa Utilities Board*." *GTE Serv. Corp.*, 205 F.3d at 424. As Justice Breyer pointed out, unbundling requirements can bring not only procompetitive benefits but also "administrative and social costs." 525 U.S. at 428. And those costs quickly mount "as one moves beyond the sharing of readily separable and administrable physical facilities" to the sharing of the "work force" required to combine separate elements in the incumbent LEC's network. *Id.* at 429. Thus, to claim that additional combinations must be provided whenever this would be more efficient from the competitive LECs' perspective ignores that "the statute's unbundling requirements, read in light of the Act's basic purposes, require balance," and that "[r]egulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle." *Id.* at 429-30.

III. THE EIGHTH CIRCUIT'S HOLDING CONCERNING THE WHOLESALE-DISCOUNT RULE DOES NOT MERIT FURTHER REVIEW.

A. Section 251(c)(4) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail." 47 U.S.C. § 251(c)(4). The applicable pricing provision, Section 252(d)(3), provides that the wholesale rate must be set "on the basis of" the incumbent LEC's "retail rates," "excluding the portion thereof attributable to any . . . costs that will be avoided by the local exchange carrier." *Id.* § 252(d)(3). The FCC adopted a pricing rule that deducts from an incumbent LEC's retail rates not only the retailing costs that the incumbent LEC actually avoids due to the wholesale arrangement, nor only the costs that the incumbent LEC could reasonably avoid if it tried as hard as humanly possible, but, rather, all the costs that it would avoid if, contrary to reality, it entirely withdrew from retailing to become a pure wholesaler. *See Local Competition Order* ¶ 911 ("the avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers"); 47 C.F.R. § 51.609 (listing categories of costs deemed avoidable).

In their challenge below, the incumbent LECs argued that, because retail costs do not decline in direct proportion to the amount of retail business lost, the FCC's wholesale discount is necessarily greater than the costs that any incumbent LEC could ever hope to avoid in real life. Incumbent LECs demonstrated that retail costs are often fixed and "lumpy": when an incumbent LEC loses a certain number of retail customers, for example, it may be able to lay off a proportional number of sales representatives, but it may not be able to save a proportional amount of rent on its retailing centers. *See* Kahn, *Letting Go* 97. Thus, the incumbent

LECs argued, the FCC's rule was both contrary to the statute and arbitrary and capricious.

The Eighth Circuit invalidated the FCC's rule as contrary to the statute's plain language. The court observed that, by making the wholesale rate a function of the incumbent LEC's retail rate, "[t]he statute recognizes that the ILEC will itself remain a retailer of telephone service with its own continuing costs of providing that retail telephone service." Pet. App. 20a. In contrast, the court noted, the FCC's rule "treats the ILEC as if it were strictly a wholesaler whose sole business is to supply local telephone service in bulk to new purveyors of retail telephone service." *Id.* That, the court held, the FCC could not do because, "[u]nder the statute as it is written, it is only those continuing costs of providing retail telephone service which will be avoided by selling to the competitor the services it requests which are to be excluded." *Id.* Accordingly, the court of appeals vacated Rule 609 and remanded the matter to the agency for further proceedings. *Id.*

B. AT&T and WorldCom — but not the FCC — now seek review of the Eighth Circuit's wholesale-discount holding. This is unwarranted, for three reasons.

First, the FCC's failure to seek review presumably reflects its recognition that the invalidation of Rule 609 is not a matter of sufficient national importance to justify this Court's attention. It would be unprecedented for this Court to second-guess the expert agency on that point. AT&T and WorldCom point to no case in which this Court agreed to review a court of appeals' decision invalidating a federal administrative regulation in a case in which the promulgating agency itself, though a party, declined to seek review.[19]

---

[19] And, as WorldCom correctly observes, *see* WorldCom Pet. 17 n.7, the wholesale-pricing issue is "completely independent from" TELRIC-

Moreover, even AT&T and WorldCom have recognized that the resale rule has limited practical significance compared to Rule 505(b)(1). Whereas both companies sought a stay in connection with the court of appeals' holding concerning Rule 505(b)(1), they did not similarly seek a stay with respect to the resale rule and, indeed, did not even support the stay request filed by a third party.[20] This is not surprising. As WorldCom recently stated: "Neither WorldCom nor AT&T . . . is relying on resale in . . . any . . . state."[21] AT&T's assertion that it is now developing "plans to use resale" (AT&T Pet. 24) *is* surprising. After embarking on a broad-based resale initiative in the wake of the enactment of the Telecommunications Act of 1996, AT&T announced in 1997 that it was withdrawing from resale entirely.[22] To our knowledge, there have been no contrary announcements since.

Second, the Eighth Circuit's holding is correct. AT&T and WorldCom imply that the issue presented is whether the statutory phrase "costs that will be avoided by the local exchange carrier" should be read to mean either "costs that

---

related issues. Thus, it would be inappropriate to grant review in connection with the wholesale-discount issue on the theory that the issue is related to the issue concerning Rule 505(b)(1).

[20] The Eighth Circuit, similarly recognizing the differential impact, stayed its mandate concerning Rule 505(b)(1) but denied the stay request with respect to the wholesale-discount rule. *See Iowa Utils. Bd. v. FCC*, No. 96-3321 (and consolidated cases) (8th Cir. Sept. 22, 2000).

[21] Declaration of A. Daniel Kelley ¶ 11, *attached to* Comments of WorldCom, Inc., *Application by Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 00-176 (FCC filed Oct. 16, 2000) <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511959786>.

[22] *See, e.g.*, Mike Mills, *AT&T Corp. Halts Effort to Sell Local Residential Phone Service*, Wash. Post, Dec. 19, 1997, at G01.

the incumbent LEC actually avoids" or "costs that the incumbent LEC can reasonably avoid." In fact, AT&T and WorldCom could not prevail under either standard. The Eighth Circuit held only that the statutory language cannot be interpreted to refer to costs that the incumbent LEC would avoid if it entirely withdrew from retail. *See* Pet. App. 19a-20a. That holding is unquestionably correct. The FCC's assumption that incumbent LECs will abandon retailing is as contrary to reality as an assumption that incumbent LECs ride magic carpets. It is also contrary to the statute. By making incumbent LECs' retail rates the starting point for their wholesale rates, Congress plainly assumed that incumbent LECs would *not* withdraw from retailing. *See* 47 U.S.C. § 252(d)(3). If Congress had intended that all retailing costs be deducted, it would simply have omitted the words "that will be avoided by the local exchange carrier."[23]

Finally, AT&T and WorldCom point to no conflict among the circuits. Although WorldCom cites purportedly conflicting decisions of two district courts and a handful of state commissions, *see* WorldCom Pet. 28-29 n.10,[24] it is

---

[23] Petitioners' complaint that the Eighth Circuit's view implicitly makes entrants bear part of the retailing costs of the incumbent LEC (AT&T Pet. 22-23) constitutes a policy argument that is at odds with the statute's plain language and is therefore more properly directed to Congress. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1951 (2000). Besides, petitioners' policy argument cannot be grounded in principles of economic efficiency: the invalidated FCC rule had the effect of "encourag[ing] the entry of resellers whose additional costs of performing [the retail] function exceed the costs society will save by having the incumbents cease to perform it." Kahn, *Letting Go* 97.

[24] In fact, many of the decisions to which WorldCom points (Pet. 28-29 n.10) do not address the issue presented here: whether Section 252(d)(3) permits a retail-exit assumption. *See, e.g., Petition for Arbitration of an Interconnection Agreement Between MCImetro Access*

settled that a conflict of authority warrants this Court's attention only if it is between courts of appeals or state courts of last resort, *see* Sup. Ct. Rule 10(a); Robert Stern, Eugene Gressman, Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* 178 (7th ed. 1993). Moreover, even if there were a genuine conflict, it would dissipate without this Court's intervention. As discussed above, the FCC has acknowledged that, in the wake of the Eighth Circuit's decision, it is "required to consider new, nationally binding rules consistent with the Eighth Circuit's decision," FCC Pet. 22, which will preclude the possibility of future conflicting state commission (or district court) rulings.

Transmission Services, Inc. and GTE Northwest Inc., Docket No. UT-960338, Arbitrator's Report and Decision at 21 (Wash. Utils. & Transp. Comm'n Apr. 3, 1997); *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration*, Case Nos. TO-97-40 & TO-97-67, Arbitration Order, 1996 Mo. PSC LEXIS 65, at *60-*61 (Mo. Pub. Serv. Comm'n Dec. 11, 1996); *U S West Communications, Inc. Filing of Advice Letter No. 2610*, Docket No. 96S-233T, Commission Decision and Order Regarding Interim Tariffs at 10, 24 (Colo. Pub. Utils. Comm'n June 21, 1996); *AT&T Communications of Illinois, Inc. Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Co.*, Nos. 95-0458 & 95-0531, Order, 1996 Ill. PUC LEXIS 320, at *16, *22, *37-*38 (Ill. Commerce Comm'n June 26, 1996); *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, Finding and Order, 1996 Ohio PUC LEXIS 361, at *107 (Ohio Pub. Utils. Comm'n June 12, 1996).

CONCLUSION

If the Court grants the petition in No. 00-511, respondents do not oppose certiorari in these cases insofar as petitioners seek review of the Eighth Circuit's holding concerning Rule 505(b)(1). In all other respects, the petitions for certiorari should be denied.

Respectfully submitted,

WILLIAM P. BARR
M. EDWARD WHELAN
VERIZON SERVICES GROUP
1850 M Street, N.W.
Washington, D.C. 20036
(202) 463-5200

PATRICK F. PHILBIN
STEVEN G. BRADBURY
JENNIFER R. BROSNAHAN
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

MICHAEL E. GLOVER
VERIZON
1320 North Courthouse Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944

Counsel for Verizon Entities

CHARLES R. MORGAN
M. ROBERT SUTHERLAND
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-4839

Counsel for BellSouth Corporation

MARK L. EVANS
Counsel of Record
MICHAEL K. KELLOGG
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for BellSouth Corporation and SBC Communications Inc.

JAMES D. ELLIS
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, Texas 78205
(210) 351-3500

ROGER K. TOPPINS
HOPE E. THURROTT
CHRISTOPHER M. HEIMANN
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8891

Counsel for SBC Communications Inc.

November 17, 2000